PLANNING ACT 2008

INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010

APPLICATION FOR THE LAKE LOTHING (LOWESTOFT) THIRD CROSSING DEVELOPMENT CONSENT ORDER

Planning Inspectorate Reference: TR010023

Written Representations of

NETWORK RAIL INFRASTRUCUTRE LIMITED

Registration Identification Number 20013190

for Deadline 3 of the Examination

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8 January 2019

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1. DEFINITIONS

1.1 In this written representation the words and phrases in column (1) below are given the meaning contained in column (2) below:

(1) Words and Phrases	(2) Meaning
1990 Act	Town and Country Planning Act 1990
1993 Act	Railways Act 1993
2008 Act	Planning Act 2008
Acquisition Land	Land belonging to Network Rail which the Promoter is seeking to permanently acquire being Plots: (a) 2-05; (b) 2-09; (c) 2-12; and (d) 2-18, in the Book of Reference and shown on the Land Plans
Airspace Acquisition Land	Land belonging to Network Rail in which the Promoter is seeking to acquire airspace over the operational railway and rights over Network Rail's residual land, being plots: (a) 2-26, (b) 2-28; and (c) 2-29, in the Book of Reference and shown on the Land Plans
Application	The application for the DCO received by the Planning Inspectorate on 13 July 2018
Authorised Development	The "authorised development" as defined in the Draft DCO
Book of Reference	The Book of Reference submitted with the Application
DCO	The proposed Lake Lothing (Lowestoft) Third Crossing Development Consent Order
DCLG Guidance	DCLG Guidance "Planning Act 2008: Guidance related to the procedures for compulsory acquisition" (September 2013)
Draft DCO	The draft DCO submitted with the Application
EHCR	The European Convention of Human Rights
Facility Owner	has the same meaning as in section 17(6) of the 1993 Act
Land Plans	The land plans submitted with the Application

Network	The railway network for which Network Rail is the Facility Owner
Network Licence	The network licence granted by the Secretary of State for Transport in exercise of his powers under Section 8 of the 1993 Act to Network Rail (then called Railtrack PLC) on 31st March 1994 as amended or modified from time to time, or any Network Licence granted to a successor of Network Rail, as the context permits;
Network Code	the common set of rules and industry procedures that apply to all parties who have a contractual right of access to the track owned and operated by Network Rail which is managed and maintained by Network Rail and overseen by the ORR and which code was formerly known as the National Track Access Conditions 1995
Network Rail	Network Rail Infrastructure Limited
Network Rail Land	Land belonging to Network Rail being plots: (a) 2-05; (b) 2-09; (c) 2-12; (d) 2-13; (e) 2-14; (f) 2-15; (g) 2-16; (h) 2-17; (i) 2-18; (j) 2-19; (k) 2-26; (l) 2-27; (m) 2-28; (n) 2-29; (o) 2-30; and (p) 2-31, in the Book of Reference and shown on the Land Plans
Network Rail Rights Land	Land (not belonging to Network Rail) which the Promoter is seeking rights to acquire permanently or rights of temporary possession and in which Network Rail has rights, being plots: (a) 1-01;

(b) 1-02;

(c) 1-03;

(d) 1-06;

(e) 1-07;

(f) 2-01;

(g) 2-07;

(h) 2-08;

(i) 2-10;

(j) 2-20;

(k) 2-21;

(l) 2-22;

(m) 2-22;

(n) 2-23;

(o) 2-25;

(p) 2-32;

(q) 2-32;

(r) 2-33; and

(s) 2-34,

in the Book of Reference and shown on the Land Plans

New Rights Land	Land belonging to Network Rail in which the Promoter is seeking to acquire unspecified new rights being plots: (a) 2-14; (b) 2-17; (c) 2-27; and (d) 2-30, in the Book of Reference and shown on the Land Plans
ORR	Office of Rail and Road
Possession	The closure of a section of the rail network which is placed under the exclusive possession of an engineer
Protective Provisions	Network Rail's standard protective provisions in the form at Annex 1.

Promoter	Suffolk County Council as the promoter of the Application
Richborough Order	The National Grid (Richborough Connection Project) Development Consent Order 2017
Statement of Reasons	The Statement of Reasons submitted with the Application
Temporary Possession Land	Land in the ownership of Network Rail in which the Promoter is seeking rights of temporary possession being plots: (a) 2-13; (b) 2-15; (c) 2-16; (d) 2-19; and (e) 2-31, in the Book of Reference and shown on the Land Plans
Track Access Agreement	An agreement in between a Train Operating Company (or Freight Operating Company) and Network Rail allowing them access to the Network and which is subject to ORR approval.
Undertaker	The Undertaker as described in the DCO

1.2 In this written representation references to Plots are references to Plots identified in the Book of Reference and the Land Plans.

2. BACKGROUND

2.1 Network Rail

2.1.1 Network Rail is a company limited by guarantee. It was formerly known as Railtrack PLC, and succeeded British Railways Board (BR) as provider of railway infrastructure in the UK.

2.1.2 Network Rail owns and operates the rail infrastructure of Great Britain. Its purpose is to deliver a safe, reliable and efficient railway for Great Britain. Network Rail is primarily responsible for maintenance, repair and renewal of track, stations, signalling and electrical control equipment. Train services on the Network are operated by Train Operating Companies and Freight Operating Companies to which Network Rail, as Facility Owner of the Network, grants rights to use the Network in the form of track, station, and depot access contracts approved by the ORR.

2.2 Network Licence

2.2.1 Network Rail operates under the Network Licence which was granted under Section 8 of the Railway Act 1993. This Network Licence contains a set of conditions under which Network Rail must operate in the public interest. As the operator and owner of the national rail infrastructure, Network Rail has a key role to play in railway safety and improving railway performance and efficiency.

2.2.2 Under Part III, Part A, Condition 1.1 of the Network Licence the purpose of the Licence is (amongst other things) to secure the operation and maintenance, improvement, enhancement and development of the Network in accordance with best practice and in a timely, efficient and economical manner. This is both in respect of the quality and capability of the Network and in the facilitation of railway service performance in

respect of services for the carriage of passengers and goods by railway operating on the Network. Condition 1.2 of the Network Licence places Network Rail under a duty to achieve this purpose.

2.2.3 Under the obligations set out in its Network Licence, Network Rail is also required to ensure the safe and efficient operation of the Network to the reasonable satisfaction of railway service providers and funders. If the ORR was to find Network Rail in breach of its licence obligations (including our overarching general duty) then the consequences could be an enforcement order or significant financial penalty.

2.2.4 Without Network Rail's standard Protective Provisions, the confirmation of a development consent order allowing the Promoter to acquire rights over and above Network Rail's operational railway would significantly harm Network Rail's role and ability to undertake its obligations as infrastructure owner and operator. It would also be likely to leave Network Rail acting inconsistently with its Network Licence obligations in respect of its residual network

2.2.5 Accordingly Network Rail has objected to the Application.

2.3 The Office of Rail and Road

Network Rail is regulated by the ORR, which monitors and enforces Network Rail's compliance with its Network Licence.

3. COMPULSORY ACQUISITION

3.1 Effect of the proposed Powers of Compulsory Acquisition on Network Rail

3.1.1 There is a long history of including protective provisions for railway undertakers in statutes and statutory instruments in order to protect their undertakings.

3.1.2 This Section 3 examines the effect of compulsory acquisition on the railway and justifies and demonstrates the importance of including Network Rail's Protective Provisions in the DCO when it is made. It also identifies where the effect if compulsory acquisition is mitigated by the protective provisions contained in the DCO and where it is not.

3.1.3 The Draft DCO contains powers of compulsory acquisition in relation to land under the ownership of Network Rail referred to in this document as the Network Rail Land. These powers divide into four sub-categories:

(a) Land which the Undertaker would be empowered to acquire permanently. This affects the Acquisition Land.

(b) Land where the Undertaker would be empowered to take the airspace over the railway and rights over the horizontal strata of land it does not take. This affects the Airspace Acquisition Land.

(c) Land where the Undertaker would be empowered to take permanent rights. This affects the New Rights Land.

(d) Land where the Undertaker would be empowered to take temporary possession. This affects the Temporary Possession Land.

3.1.4 The Draft DCO also contains powers of compulsory acquisition in relation to land which is not under the ownership of Network Rail but in respect of which Network Rail has rights. This land is referred to in this document as the Network Rail Rights Land.

3.2 Network Rail's General Approach to Asset Protection and Works Affecting the Network

3.2.1 Absent the Protective Provisions the Draft DCO would allow the Undertaker to take entry on to the Network Rail Land to undertake pre-construction and construction works without the appropriate railway protection measures being in place. This would have a major impact on the operation and the safety of the railway.

3.2.2 The Protective Provisions would mean in practice that if the Undertaker needs to undertake survey work and/or tree clearance before construction commences, this must be undertaken following Network Rail procedures and approvals under the appropriate Asset Protection Agreement(s).

3.2.3 A Basic Asset Protection Agreement (**BAPA**) would support the review of the outline design, facilitate access on to the Network Rail Land and allow topographical and geotechnical surveys, and the completion of a Bridge Agreement. A Basic Asset Protection Agreement is a simple contracting agreement between Network Rail and an outside party to allow interaction and to establish roles, responsibilities and liabilities of a project over, under or adjacent to the railway

3.2.4 A BAPA facilitates initial dialogue and enables a promoter to gain access to Network Rail infrastructure for survey works to enable scheme development up to Approval in Principle stage. It also allows for drafting of a Bridge Agreement (see paragraph 3.3.10(b) below. By proceeding under a BAPA Network Rail is fulfilling its statutory duty to protect the railway, with the Asset Protection Team managing access, site safety management, engineering services, and possession arrangements as necessary. For the permanent works to progress the a Bridge Agreement needs to be in place and the BAPA is normally extinguished when Bridge Agreement is signed.

3.2.5 The closure of a section of the Network requires what is known as a Possession:

(a) A "Rules of the Route" Possession is a schedule of engineering access opportunities that do not conflict with the approved planned operational services. The schedule of the Rules of the Route is negotiated with formal consultation with train operators and Network Rail s Integrated Planning Managers. Rules of Route possessions have a minimum of 18 weeks possession and isolation booking timescales.

(b) Any Possession that does not comply with Rules of the Route opportunities is contractually in breach of the conditions with the train operating companies and therefore considered disruptive. Disruptive access requires significant negotiations with Train Operating Companies and Freight Operating Companies and triggers penalties/compensation having to be paid to them under the Schedule 4 (planned disruption) mechanism in Track Access Agreements. Disruptive possessions have booking timescales of approximately 2 years

3.2.6 The preliminary and construction works, if not managed under the provisions of Network Rail Asset Protection Agreement(s) or in relation to construction a Bridge Agreement would be likely to have a major impact on the safety of the operational railway. Proposed works must be reviewed and approved by the appropriate teams within Network Rail and without this process the Undertaker and its authorised personnel and contractors could take entry on to the Network Rail Land at short notice and without an approved/booked Possession of the railway line, therefore forcing Network Rail to stop the trains. This would be contrary to Network Rail's Network Licence.

3.2.7 The rights sought by the Promoter would not take account of the need to obtain Possessions. Such enforced entry onto the live railway line, without any Network Rail approved Possession, could also mean Network Rail incurring considerable expense in terms of the penalties/compensation having to be paid to Train Operating Companies and Freight Operating Companies who would be unable to run their trains

along this stretch of line. Such compensation is payable under Schedule 8 (unplanned disruption) mechanism in Track Access Agreements.

3.2.8 In this context it is notable that the Promoter has included sub-paragraph 44(6) the protective provisions included in the Draft DCO, which seeks to exclude compensation for indirect or consequential loss of profits (see Section 4.2.3 below).

3.2.9 No railway Possessions have been booked on behalf of the Undertaker for the construction of the bridge and the type of possession required is not yet known.

3.2.10 An Outline Approval in Principal document has been received and reviewed. This document (in the Promoter's highway format) incorporates all the elements required in Network Rail's own Form 001 – Approval in Principal. All the comments raised during Network Rail's review have now been closed (ie the Promoter's responses to comments raised have been accepted by Network Rail) however Network Rail cannot issue formal acceptance of the Approval in Principal until a Bridge Agreement is in place and all the Clearances have been approved (see paragraph 3.3.3 below).

3.3 Network Rail's General Approach to Bridges over the Railway

3.3.1 As a result of the issues highlighted in the previous section, Network Rail will as a matter of course submit a holding objection to a development consent order which includes powers of compulsory acquisition, in order to allow time for the scheme and land requirements to be fully reviewed and considered. Network Rail will require that its standard Protective Provisions are included in the development consent order as made to ensure that acquisition of land and rights is dealt with in accordance with the following procedure.

3.3.2 Following submission of Network Rail's holding objection, the land and rights required under the proposed development consent order will be submitted for approval through Network Rail's internal clearance process.

3.3.3 Clearance is Network Rail's internal process for authorising the disposal of any interest in land. Although it is not in itself a statutory process, it is a process which allows Network Rail to undertake the due diligence necessary to ensure that it complies with its Network Licence.

3.3.4 The current position in relation to Clearances is as follows:

(a) CR/36489: Clearance for the bridge easement/wayleave. This has been approved and issued.

(b) CR/36490: Clearance for the sale of land containing the bridge pier. This has been approved and issued.

(c) CR/36491: Clearance for the 'buffer zones' on either side of the bridge (the New Rights Land). This cannot be approved because Network Rail would not grant the New Rights in respect of the railway. Instead standard practice is for a mechanism to be provided for in the Bridge Agreement, under which the Undertaker would contact Network Rail's Asset Protection and Optimisation (ASPRO) Team and enter into a BAPA to facilitate access.

(d) CR/36530: Clearance for the temporary possession of land. This has been approved and issued.

3.3.5 Clearance is also a process which must be completed before the ORR will issue consent under Licence Condition 7 of Network Rail's Network Licence.

3.3.6 Under Licence Condition 7 of the Network Licence, Network Rail must obtain consent from the ORR before it makes a disposal. The term disposal includes both transfers of

land and the granting of easements. The ORR requires Network Rail to provide details of its internal Clearances with the notice of disposal.

3.3.7 Clearance must therefore be approved before the land and rights required for a scheme can be considered for disposal.

3.3.8 Before the holding objection to a development consent order can be withdrawn, Network Rail's standard approach is to require a Promoter to enter into a Deed of Undertaking (sometimes referred to as a framework agreement).

3.3.9 The Deed of Undertaking will usually stipulate that, in return for the Promoter agreeing to not exercise rights under the development consent order in relation to Network Rail's land and interests, Network Rail will make the land and rights required for the scheme available by agreement. Importantly, this allows Network Rail to include its standard railway engineering protective provisions (note these are distinct from the Protective Provisions in a development consent order) and internal Clearance conditions within the legal agreements to ensure that Network Rail's operational assets are adequately protected.

3.3.10 Network Rail's approach to road over rail highway bridges is to grant the highway authority rights to construct and maintain the bridge. This entails the making of two agreements:

(a) A property agreement for the granting of a permanent easement to construct and then to have, use and maintain bridge within the airspace over the railway line; and

(b) A Two-Party Overbridge Agreement which governs the design, construction and future inspection, repair, maintenance and renewal and removal of the bridge.

3.3.11 The Bridge Agreement details the arrangements for the introduction and ongoing management of an outside party bridge over the railway. It is for the life of the structure. It sets out ownership, roles and responsibilities, liability and insurance for a new overbridge. It details the location of the structure, provides a bespoke bridge reference number, defines technical requirements and details key attributes such as headroom and lateral clearance. The Bridge Agreement was created in association with the then County Surveyor's Society (now ADEPT) in order to protect the railway corridor (as defined under the Railway Act) from the risk imported through the construction of new bridges. It also gives a mechanism to escalate matters in order to protect the railway corridor.

3.3.12 Network Rail does not consider that it is appropriate to transfer the freehold title to the airspace in which a bridge is to be constructed to the Undertaker. Instead Network Rail's practice is to grant rights as set out in paragraph 3.3.10 above and to dedicate the bridge and the way it carries as highway if requested. This avoids a situation at the end of the operational life (and/or stopping up) of the road bridge where a local highway authority owns airspace over the railway which it no longer requires, resulting fragmentation of ownership of railway land.

3.3.13 Subject to the outcome of its clearance process, Network Rail will consider permanently transferring the land on which a highway authority intends to construct a bridge pier or abutment.

3.4 Tests in the Planning Act 2008

3.4.1 When considering whether or not to make a development consent order conferring powers of compulsory acquisition in respect of land which is owned by statutory undertakers or in which statutory undertakers have rights the key tests are set out in Sections 122, 127 and 138 of the 2008 Act.

3.4.2 These tests have not been met in relation to the Network Rail Land or the Network Rail Rights Land and, accordingly, the powers should not be granted, or, if the powers are granted in the DCO, then Network Rail's Protective Provisions must also be included in the form attached to this Written Representation.

3.5 Section 122 of the 2008 Act

3.5.1 Section 122 of the 2008 Act sets out the principal test for the Secretary of State in determining whether or not to include powers of compulsory acquisition in a development consent order.

3.5.2 Section 122 states as follows:

> ***122 Purpose for which compulsory acquisition may be authorised***
>
> *(1) An order granting development consent may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met.*
>
> *(2) The condition is that the land—*
>
> *(a) is required for the development to which the development consent relates,*
>
> *(b) is required to facilitate or is incidental to that development, or*
>
> *(c) is replacement land which is to be given in exchange for the order land under section 131 or 132.*
>
> *(3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.*

3.5.3 Section 159 provides that "Land" includes any interest in or right over land.

3.5.4 The first part of this test is that the land is "required" for the development. This word is not defined in the 2008 Act, however Paragraph 11 of the DCLG Guidance states in relation to Section 122(2)(a):

> *"…the applicant should be able to demonstrate to the satisfaction of the Secretary of State that the land in question is needed for the development for which consent is sought. The Secretary of State will need to be satisfied that the land to be acquired is no more than is reasonably required for the purposes of the development."*

Paragraph 11 continues in relation to Section 122(2)(b):

> *"An example might be the acquisition of land for the purposes of landscaping the project. In such a case the Secretary of State will need to be satisfied that the development could only be landscaped to a satisfactory standard if the land in question were to be compulsorily acquired, and that the land to be taken is no more than is reasonably necessary for that purpose, and that is proportionate."*

3.5.5 The word "required" in Section 122 of the 2008 Act also mirrors the wording of Section 226(1)(a) of the 1990 Act (as that Section was originally enacted). The meaning of that word was considered by the Court of Appeal in Sharkey v Secretary of State for the Environment (1992) 63 P. & C.R. 332 where McGowan LJ stated:

> *"…the local authority do not have to go so far as to show that the compulsory purchase is indispensable to the carrying out of the activity or the achieving of the purpose; or, to use another similar expression, that it is essential. On the other hand, I do not find the word 'desirable' satisfactory, because it could be mistaken for 'convenient' , which*

clearly, in my judgment, is not sufficient. I believe the word 'required' here means 'necessary in the circumstances of the case'."

Although *Sharkey* related to a different piece of legislation, in light of the DCLG Guidance set out above it would seem reasonable to conclude that the word "required" in Section 122(1)(a) and (b) should be interpreted in the same manner.

3.5.6 The Secretary of State must also be satisfied that there is a "compelling case in the public interest" for the land to be acquired compulsorily. Paragraph 13 of the DCLG Guidance states:

"For this condition to be met, the Secretary of State will need to be persuaded that there is compelling evidence that the public benefits that would be derived from the compulsory acquisition will outweigh the private loss that would be suffered by those whose land is to be acquired. Parliament has always taken the view that land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss."

3.5.7 Paragraphs 14 to 16 of the DCLG Guidance continue by explaining that "…the Secretary of State will weigh up the public benefits that a scheme will bring against any private loss to those affected by compulsory acquisition." When addressing the question of whether to grant powers of compulsory acquisition the decision maker is also bound to have regard to Article 1 of the First Protocol of EHCR (protection of property).

3.5.8 Land and rights belonging to a statutory undertaker statutory undertaker and is a special species of land. This is recognised by the special protection applied to such land by virtue of Section 127 of the 2008 Act (see Section 3.6 below). These protections are necessary because such undertakings provide a public service. The public interest test in Section 122(3) of the 2008 Act therefore falls to be determined not just by weighing the public benefits of the scheme against the private loss of Network Rail, but also against the public dis-benefits caused by the disruption of Network Rail's undertaking, which are inseparable from Network Rail's private interest.

3.5.9 The Draft DCO contains powers which would allow the permanent compulsory acquisition of parts of the operational railway (see Plots 2-09, 2-12 and 2-18). In order to ensure that it is able to continue to comply with the terms of its Network Licence after it sells land, Network Rail uses a standard form transfer. The compulsory acquisition of the Acquisition Land would not provide these safeguards.

3.5.10 The same principle applies to the rights Network Rail has reserved over the Network Rail Rights Land. These rights are required in order to ensure that Network Rail is able to continue to comply with the terms of its Network Licence after it sells land. The extinguishment of these rights would remove these safeguards.

3.5.11 The Draft DCO also contains powers which could have the effect of closing the Railway for a period of several years. For example Articles 32 and 33 of the Draft DCO would allow the Undertaker to take temporary possession of the Temporary Possession Land and to remain in possession for an indefinite period. This would prevent the passage of trains and cause severe disruption to passengers, and would be contrary to the terms of the Network Licence.

3.5.12 The nature of the restrictive covenants to be imposed on the land underneath the Airspace Acquisition Land (ie the operational railway) and on the New Rights Land is not specified. It must therefore be assumed that the power is drawn very widely. This does not provide the necessary careful balance between the operational needs of the railway and those of the highway authority and would be very likely to lead to Network Rail not being able to comply with its Network Licence.

3.5.13 The consequences of granting the powers of compulsory acquisition set out in the Draft DCO without including the Protective Provisions would therefore potentially be very severe both in terms of public and private loss. It would be likely to impact safety and operational efficiency, and ultimately lead to passenger delay and cancelled services. It would also be likely to require Network Rail to pay compensation to Train Operating Companies and Freight Operating Companies under the Schedule 8 (unplanned disruption) mechanism in Track Access Agreements It follows that the test set out in Section 122 would not be satisfied in respect of the Network Rail Land and the Network Rail Rights Land and that the powers of compulsory acquisition which the Promoter is seeking in relation to this land should not be granted unless they are properly constrained by Network Rail's standard Protective Provisions.

3.6 Section 127 of the 2008 Act

3.6.1 Compulsory Acquisition of Statutory Undertakers' Land

(a) Section 127 contains provisions conveying special protection for statutory undertakers' land by introducing a special test which must be applied by the Secretary of State before powers of compulsory acquisition are granted. Under Section 127(1):

(1) This section applies in relation to land ("statutory undertakers' land") if—

(a) the land has been acquired by statutory undertakers for the purposes of their undertaking,

(b) a representation has been made about an application for an order granting development consent before the completion of the examination of the application, and the representation has not been withdrawn, and

(c) as a result of the representation the Secretary of State is satisfied that—

(i) the land is used for the purposes of carrying on the statutory undertakers' undertaking, or

(ii) an interest in the land is held for those purposes.

(b) It is clear that Section 127 of the 2008 is engaged:

(i) Statutory undertaker is defined in Section 127(8) of the 2008 Act by reference to Section 8 of the Acquisition of Land Act 1981. Section 8(1)(a) of the 1981 Act includes: "any person authorised by any enactment to construct, work or carry on… any railway… undertaking".

(ii) Network Rail has made a representation in respect of the Application.

(iii) Network Rail is the owner of the Network Rail Land and operates the railway. The railway continues to be used for rail traffic. It follows that Network Rail is also a statutory undertaker within the meaning of Section 127(8) of the 2008 Act.

(c) Under Sections 127(2) and (3) a development consent order "may include provision authorising the compulsory acquisition of statutory undertakers' land only to the extent that the Secretary of State is satisfied" that one of the following is satisfied:

(3) …the nature and situation of the land are such that—

(a) it can be purchased and not replaced without serious detriment to the carrying on of the undertaking, or

(b) if purchased it can be replaced by other land belonging to, or available for acquisition by, the undertakers without serious detriment to the carrying on of the undertaking.

(d) Sections 127(2) and (3) apply to the Acquisition Land and the part of the Airspace Acquisition Land which is to be permanently acquired and the Temporary Possession Land.

(e) Permanent acquisition and/or the taking of temporary possession of parts of Network Rail's operational railway pursuant to the DCO would interrupt rail services and cause delays and cancelled services for passengers. Absent the Protective Provisions, the Draft DCO would not provide adequate safeguards to minimise disruption to services and would therefore cause serious detriment to the carrying on of Network Rail's undertaking.

(f) The established system of railway "possessions" under the Network Code provides a far more suitable and balanced mechanism under which these works may be carried out. It is essential that the any closure of the railway necessitated by the Authorised Development is of a very limited duration (ie limited to a matter of days and not years). As a general principle, the taking of the Network Rail Land should only be with Network Rail's permission, under their supervision and for such period of time as Network Rail stipulates.

(g) As stated in paragraph 3.3.12 above the Airspace Land should not be acquired permanently.

(h) The Draft DCO contains a number of powers to acquire land both permanently and temporarily which are subject to this test. In light of the issues referred to above Network Rail considers that absent the Protective Provisions these powers could not be taken without serious detriment to the carrying on of its railway undertaking.

(i) Network Rail is also particularly concerned about Article 34 which relates to the compulsory acquisition of statutory undertakers' land. This power appears to override Article 32(9) which prevents the permanent acquisition of the Temporary Possession Land. The Draft DCO as drafted would therefore allow the compulsory acquisition of the Temporary Possession Land. This issue is adequately dealt with assuming that Network Rail's Protective Provisions are included in the DCO.

(j) It is important in this regard to note that the power of appropriation included in Article 29 and the powers in Articles 10 and 11 are rights of this type, but that they do not benefit from the protective provisions included in the Draft DCO. See Section 4.2.2 below which sets out how this may be remedied by including Network Rail's standard Protective Provisions in the DCO.

3.6.2 Compulsory Acquisition of New Rights over Statutory Undertakers' Land

(a) Under Sections 127(5) and (6) a development consent order "may include provision authorising the compulsory acquisition of a right over statutory undertakers' land by the creation of a new right over land only to the extent that the Secretary of State is satisfied" that one of the following is satisfied:

(6) …that the nature and situation of the land are such that—

(a) the right can be purchased without serious detriment to the carrying on of the undertaking, or

(b) any detriment to the carrying on of the undertaking, in consequence of the acquisition of the right, can be made good by the undertakers by the use of other land belonging to or available for acquisition by them.

(b) Sections 127(5) and (6) apply to the land underneath the Airspace Acquisition Land (ie the operational railway) New Rights Land .

(c) The rights which may be taken are not specified and it must be assumed that the power is drawn very widely. This does not provide the necessary careful balance between the operational needs of the railway and those of the highway authority and would be very likely to lead to Network Rail not being able to comply with its Network Licence.

(d) Absent the Protective Provisions, the taking of unspecified rights over the Network Rail Land in the uncontrolled way provided for by the Draft DCO would be likely to have detrimental impacts on Network Rail's statutory undertaking. The extent and nature of these impacts is uncertain, but due to the wide discretion which is afforded by the draft DCO they could be very severe indeed.

(e) Network Rail is also very concerned for the potential for movement of Network Rail track infrastructure which could arise due to the loads imposed during and following the bridge construction. This could impact safety and operational efficiency and ultimately lead to passenger delay and cancelled services. The Protective Provisions would allow Network Rail to require protective works to be carried out.

(f) The Draft DCO contains a number of powers to acquire rights which are subject to this test, The Statement of Matters does not demonstrate that the land can be purchased without serious detriment to the carrying on of the undertaking and the powers which are being sought in relation to Network Rail's interests in the Network Rail Land should not be granted unless the Protective Provisions are included in the DCO.

(g) It is important in this regard to note that Articles 10, 11, 12, 15, 19 and 29 are rights of this type, but that they do not benefit from the protective provisions included in the Draft DCO. See Section 4.2.2 below which sets out how this may be remedied by including Network Rail's standard Protective Provisions in the DCO.

3.7 Section 138 of the 2008 Act

3.7.1 Section 138 contains a special test which must be applied by the Secretary of State before powers of compulsory acquisition are granted which would extinguish a right or way, or a right of laying down, erecting, continuing or maintaining apparatus on, under or over land" where that right is vested in a statutory undertaker for the purposes of their statutory undertaking. Under Section 138(4):

(4) The order may include provision for the extinguishment of the relevant right, or the removal of the relevant apparatus, only if the Secretary of State is satisfied that the extinguishment or removal is necessary for the purpose of carrying out the development to which the order relates.

3.7.2 The Draft DCO contains a number of powers to extinguish rights. Although the Statement of Matters makes reference to Section 138, no justification has been made out for the removal of Network Rail's rights in the Network Rail Land or the Network Rail Rights Land. Accordingly no case has been made out that the extinguishment of Network Rail's rights is necessary to allow the development to proceed and unless Network Rail's standard the Protective Provisions are included in the DCO the powers

which are being sought in relation to Network Rail's interests in the Network Rail Rights Land should not be granted.

3.7.3 It is important in this regard to note that Articles 10, 11, 29 and 35 are rights of this type, but that they do not benefit from the protective provisions included in the Draft DCO. See Section 4.2.2 below which sets out how this may be remedied by including Network Rail's standard Protective Provisions in the DCO.

4. NETWORK RAIL'S OBJECTION

4.1 The Draft DCO

4.1.1 New private means of access to the Network Rail Land are shown on Sheet 1 of the Rights of Way and Access Plans. Network Rail has not had an opportunity to consider or review the adequacy of these new accesses and has not been provided with sufficient information about how the access would work. For example whether it would be expected to get to the accesses along the proposed new cycle track. Once this detail is provided and assuming that the proposal is acceptable in principle it would be necessary to obtain Clearance for the new accesses. Network Rail is not therefore presently in a position to respond on whether the new accesses should be provided at the locations specified and reserves its right to make further representations in relation to this issue.

4.1.2 Network Rail is concerned about the lateral Limits of Deviation contained in Article 6 of the draft DCO:

(a) Article 6(3)(a) provides that linear works (such as Work No 1B) may deviate laterally within the limits of deviation.

(b) The precise location of the proposed bridge can have profound effects on the operation of the railway. For example the location of the bridge may effect signal sighting distances or may require extensive works in respect the supports for Network Rail's overhead line equipment (ie the overhead electric line used by electric locomotives). It may create a dead spot, adversely affect Network Rail's Global System for Mobile Communications-Railway (GSM-R), which delivers digital, secure and dependable communications between drivers and signallers and improves safety, reduces delays and improves performance.

(c) Accordingly, Article 6(3)(a) is not acceptable to Network Rail in its current form (in so far as it relates to Work No 1B). Any horizontal movement must be subject the review by Network Rail before it could be confirmed as acceptable

4.1.3 Network Rail is also concerned about the vertical Limits of Deviation contained in Article 6 of the draft DCO:

(a) The headroom for the railway is shown on the Engineering Section Drawings at 4.9 metres which is the absolute minimum acceptable to Network Rail;

(b) Schedule 8 specifies the stratum of Airspace Acquisition Land which may be acquired by reference to "height above Ordnance Datum". Setting to one side Network Rail's objection to the framing of this power as the permanent acquisition of airspace, Schedule 8 sets out a point below which the right to construct and operate the new bridge would not apply. Network Rail is currently checking that the figure specified in Schedule 8 in respect of Plot 2-26 is accurate so as to maintain 4.9 metres of headroom under the bridge soffit. and reserves the right to make further representations on this point in the even that it is not.

(c) However in Article 6 (Limits of Deviation) of the Draft DCO, sub-articles 6(7) and 6(8) allow the bridge over the railway to drop 2.3 metres (ie from 4.9 metres to 2.6 metres) above the railway. This appears to provide an option to construct the

bridge in such a manner and in such situation as would require the removal of Network Rail's overhead line equipment (ie the overhead electric line used by electric locomotives) and block the line to the passage of trains. This is not acceptable to Network Rail and would be contrary to the terms of its Network Licence. It also appears to run contrary to Article 26 and Schedule 8 of the Draft DCO.

(d) The Draft DCO must be amended to remove reference to Work 1B from the table at Article 6(6) or to provide that the vertical limit of deviation may not be revised downwards

4.2 Protective Provisions

4.2.1 Background

(a) There are protective provisions for the benefit of Network Rail which are well precedented both in orders under the Transport and Works Act 1992 and development consent orders.

(b) Examples of those protective provisions in respect of highway schemes can be found in recent A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016.

(c) In practice, the effect of the Protective Provisions is to encourage and require the Promoter to enter into private treaty agreements with Network Rail in order to obtain the rights and interests it requires. Most of these agreements are based on precedent form agreements published on Network Rail's website, whilst the bridge agreement is based on a form agreed with the former Country Surveyor's Society (now the Association of Directors of Environment, Economy, Planning & Transport (ADEPT)). This system is transparent and has a track record of delivering infrastructure.

(d) The Draft DCO contains protective provisions which broadly follow these precedents. However they differ in two significant respects which mean that they are not acceptable to Network Rail in their current form. These are assessed in Sections 4.2.2 and 4.2.3 below.

(e) There are also some minor amendments and typos which need to be corrected. These amendments are shown in red on the Protective Provisions at Annex 1 below.

4.2.2 Schedule 13, Part 4, Paragraph 33(1)

(a) Paragraph 33 limits the application of the Draft DCO and prevents a number of powers being exercised by the Promoter in respect of Network Rail's land and rights.

(b) Based on the precedent orders referred to above, however, the protective provisions also need to include – and there is precedent for them to include – restrictions on exercising the following additional Articles of the Draft DCO:

(i) 10. Permanent stopping up of streets and private means of access

(ii) 11. Temporary stopping up and restriction of use of streets

(iii) 12. Access to works

(iv) 15. Discharge of water

(v) 19. Trees subject to tree preservation orders

(vi) 29. Rights over or under streets

(vii) 35. Apparatus and rights of statutory undertakers in stopped up streets.

(c) A justification for the inclusion of these Articles is set out in Sections 3.6.1(j), 3.6.2(g) and 3.7.3 above.

(d) These amendments are shown in red on the Protective Provisions at Annex 1 below.

4.2.3 Sub-paragraph 44(6)

(a) This sub-paragraph relates to the costs/damages clause and states:

(6) In no circumstances is the undertaker liable to Network Rail under sub-paragraph (1) for any indirect or consequential loss of profits, except that the sums payable by the undertaker under that sub-paragraph include a sum equivalent to the relevant costs in circumstances where—

(a) Network Rail is liable to make payment of the relevant costs pursuant to the terms of an agreement between Network Rail and a train operator; and

(b) the existence of that agreement and the extent of Network Rail's liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in writing to the undertaker, but not otherwise.

(b) This clause appears to have two main effects:

(i) It removes the undertaker's liability for any indirect – or consequential – loss of profits; and

(ii) It removes the undertaker's liability to refund NR in respect of NR's liability for the costs, direct losses and expenses of TOs – except where NR has told the undertaker about the existence of the agreement under which that liability arises.

(c) This sub-paragraph has no precedent in development consent orders relating to highway schemes and should be deleted as shown in red on the Protective Provisions at Annex 1 below..

(d) The Promoter has referred Network Rail to the inclusion of this provision in Richborough Order in 2017.

(e) The Richborough Order appears to be a unique departure from Network Rail's standard protective provisions in relation to this provision. Moreover, the order related to a different type of infrastructure to the Application. The precise circumstances of the promoter of the Richborough Order or the land or rights sought may have given rise to this departure from Network Rail's standard protective provisions: the precise reasons are not apparent from the decision.

(f) Moreover, unusually, Network Rail is placed under specific statutory duties to provide compensation to Train Operating Companies and Freight Operating Companies where there is an interruption to the availability of the Network. It is not practicable and may not in all circumstances be lawful for Network Rail to disclose those agreements to the undertaker.

5. SUMMARY AND CONCLUSIONS

5.1 Network Rail owns and operates the rail infrastructure of Great Britain. Its purpose is to deliver a safe, reliable and efficient railway for Great Britain. Network Rail is primarily responsible for maintenance, repair and renewal of track, stations, signalling and electrical control equipment. Train services on the Network are operated by Train Operating Companies and Freight Operating Companies to which Network Rail, as Facility Owner of the Network, grants rights to use the Network in the form of track, station, and depot access contracts approved by the ORR.

5.2 Network Rail operates under the Network Licence which was granted under Section 8 of the Railway Act 1993. This Network Licence contains a set of conditions under which Network Rail must operate in the public interest. As the operator and owner of the national rail infrastructure, Network Rail has a key role to play in railway safety and improving railway performance and efficiency.

5.3 Under Part III, Part A, Condition 1.1 of the Network Licence the purpose of the Licence is (amongst other things) to secure the operation and maintenance, improvement, enhancement and development of the Network in accordance with best practice and in a timely, efficient and economical manner. This is both in respect of the quality and capability of the Network and in the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the Network. Condition 1.2 of the Network Licence places Network Rail under a duty to achieve this purpose.

5.4 Under the obligations set out in its Network Licence, Network Rail is also required to ensure the safe and efficient operation of the Network to the reasonable satisfaction of railway service providers and funders. If the ORR was to find Network Rail in breach of its licence obligations (including our overarching general duty) then the consequences could be an enforcement order or significant financial penalty.

5.5 Without Network Rail's standard Protective Provisions, the confirmation of a development consent order allowing the Promoter to acquire rights over and above Network Rail’s operational railway would significantly harm Network Rail’s role and ability to undertake its obligations as infrastructure owner and operator. It would also be likely to leave Network Rail acting inconsistently with its Network Licence obligations in respect of its residual network

5.6 Network Rail submits that its standard Protective Provisions for highway schemes should be included in the DCO if it is made. Annex 1 of Network Rail's Written Representation contains these Protective Provisions, showing the required amendments from the drafting contained in the Draft DCO.

5.7 Network Rail's general approach to applications for powers of compulsory acquisition in development consent orders is set out in Section 3.2 and 3.3 above. In essence, in order to comply with its Network Licence it requires and land and/or rights required for a scheme to be dealt with by private treaty via a series of template agreements. The Protective Provisions provide the protections for Network Rail which allow this to happen.

5.8 Network Rail does not object in principle to the construction of the bridge through the airspace of the railway and has been working with Suffolk County Council in order to agree terms which would allow Network Rail to withdraw its objection

5.9 However the making of the DCO in the form of the Draft DCO would be likely to cause serious harm to the carrying out of Network Rail’s statutory undertaking contrary to Sections 127 and 138 of the 2008 Act. In particular:

5.9.1 The permanent acquisition of Network Rail's land and rights would not contain the necessary rights and reservations (established under the Clearance Process – see Section 3.3.3 above) to Network Rail such that it would be able to comply with its Network Licence (which would be secured for Network Rail if Network Rail's preferred method of transfer by private treaty is relied on) (see Section 3.6 above).

5.9.2 There should be no permanent acquisition in respect of the Airspace Acquisition Land (see paragraph 3.3.12 above).

5.9.3 The rights sought over the Airspace Acquisition Land and the New Rights Land are unspecified and are broadly drawn (see paragraphs 3.5.12 and 3.5.13 above).

5.9.4 The powers sought over the Temporary Possession Land in particular would prevent the passage of trains and would place Network Rail in breach of its Network Licence (see paragraph 3.5.11 above)).

5.9.5 The powers sought in relation to the New Rights Land are not acceptable to Network Rail. Network Rail would not grant the New Rights in respect of the railway. Instead standard practice is for a mechanism to be provided for in the Bridge Agreement, under which the Undertaker would contact Network Rail's Asset Protection and Optimisation (ASPRO) Team and enter into a BAPA to facilitate access.

5.10 Network Rail is also concerned about the Limits of Deviation contained in Article 6 of the Draft DCO insofar as they apply to Work No.1B (ie the bridge over the railway). This applies both in respect of lateral and vertical deviation. In particular, Network Rail is concerned that sub-articles 6(7) and 6(8) allow the bridge over the railway to drop 2.3 metres (ie from 4.9 metres to 2.6 metres) above the railway. Details of this objection are set out in Section 4.1 above.

5.11 It is respectfully requested that the Examining Authority recommend to the Secretary of State that the Draft DCO should not be made in its current form.

5.12 However in the event that:

5.12.1 The Limits of Deviation are amended as described in paragraph 4.1.3(d) above; and

5.12.2 The Protective Provisions are amended as follows

(a) Reference to Articles 10, 11, 12, 15, 19, 29 and 35 of the Draft DCO is added to paragraph 33(1); and

(b) Sub-paragraph 44(6) is deleted,

as set out in the Protective Provisions at Annex 1,

Network Rail would be in a position to withdraw its objection to the Application. However unless and until that occurs, Network Rail's objection must stand.

Womble Bond Dickinson (UK) LLP

8 January 2019

ANNEX 1

Protective Provisions

PART 4

FOR THE PROTECTION OF RAILWAY INTERESTS

30. The following provisions of this Part of this Schedule have effect, unless otherwise agreed in writing between the undertaker and Network Rail, and in the case of paragraph 44, any other person on whom rights or obligations are conferred by that paragraph.

31. In this Part of this Schedule—

"construction" includes execution, placing, alteration and reconstruction and "construct" and "constructed" have corresponding meanings;

"the engineer" means an engineer appointed by Network Rail for the purposes of this Order;

"network licence" means the network licence, as the same is amended from time to time, granted to Network Rail Infrastructure Limited by the Secretary of State in exercise of his powers under section 8 of the Railways Act l993;

"Network Rail" means Network Rail Infrastructure Limited (company number 0204587, whose registered office is at 1 Eversholt Street, London, NW1 2DN) and any associated company of Network Rail Infrastructure Limited which holds property for railway purposes, and for the purpose of this definition "associated company" means any company which is (within the meaning of section 1159 of the Companies Act 2006) the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited;

"plans" includes sections, designs, design data, software, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), staging proposals, programmes and details of the extent, timing and duration of any proposed occupation of railway property;

"protective works" means any works specified by the engineer under paragraph 34(4);

"railway operational procedures" means procedures specified under any access agreement (as defined in the Railways Act 1993(a)) or station lease;

"railway property" means any railway belonging to Network Rail and-

(a) any station, land, works, apparatus and equipment belonging to Network Rail or connected with any such railway; and

(b) any easement or other property interest held or used by Network Rail for or connected with the purposes of such railway or works, apparatus or equipment; and

"specified work" means so much of any of the authorised development as is or is to be situated upon, across, under, over or within 15 metres of, or may in any way adversely affect, railway property.

32.—(1) Where under this Part of this Schedule Network Rail is required to give its consent or approval in respect of any matter, that consent or approval is subject to the condition that Network Rail complies with any relevant railway operational procedures and any obligations under its network licence or under statute.

(2) In so far as any specified work or the acquisition or use of railway property or rights over railway property is or may be subject to railway operational procedures, Network Rail must—

(a) co-operate with the undertaker with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements emanating from those procedures; and

(b) use its reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised development under this Order.

33.—(1) The undertaker must not exercise the powers conferred by articles 4 (development consent etc granted by the Order), 10 (permanent stopping up of streets and private means of access), 11 (temporary stopping up and restriction of use of streets), 12 (access to works), 14 (use of private roads for construction), 15 (discharge of water), 16 (protective works to buildings), 17 (authority to survey and investigate land), 18 (felling or lopping of trees), 19 (trees subject to tree preservation orders), 22 (compulsory acquisition of land), 25 (compulsory acquisition of rights), 26 (acquisition of subsoil and airspace only), 27 (private rights over land) 28 (power to override easements and other rights), 29 (rights over or under streets), 32 (temporary use of land for carrying out the authorised development), 33 (temporary use of land for maintaining the authorised development) and 34 (statutory undertakers), 35 (apparatus and rights of statutory undertakers in stopped up streets), 42 (maintenance of authorised development) and 43 (subsidiary works and operations) or the powers conferred by section 11(3) of the 1965 Act (powers of entry) or the 1981 Act as applied by this Order in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.

(2) The undertaker must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Network Rail.

(3) The undertaker must not exercise the powers conferred by sections 271 (extinguishment of rights of statutory undertakers: preliminary notices) or 272 (extinguishment of rights of electronic communications code operators: preliminary notices) of the 1990 Act or article 34 (statutory undertakers) in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.

(4) The undertaker must not under the powers of this Order acquire or use or acquire new rights over any railway property except with the consent of Network Rail.

(5) Where Network Rail is asked to give its consent under this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions.

34.—(1) The undertaker must before commencing construction of any specified work supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration.

(2) The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated disapproval of those plans and the grounds of disapproval the undertaker may serve upon the engineer written notice requiring the engineer to intimate ~~his~~ approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from the undertaker. If by the expiry of the further 28 days the engineer has not intimated approval or disapproval, the engineer is to be deemed to have approved the plans as submitted.

(3) If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2) Network Rail gives notice to the undertaker that Network Rail desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker desires such part of the specified work to be constructed, Network Rail must construct it without unnecessary delay on behalf of and to the reasonable satisfaction of the undertaker in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision (where appropriate and if given) of the undertaker.

(4) When signifying his approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in the engineer's opinion must be carried out before the commencement of the construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail or the services of operators

using those railways (including any relocation, decommissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes must be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works must be carried out at the expense of the undertaker in either case without unnecessary delay and the undertaker must not commence the construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to his reasonable satisfaction.

35.—(1) Any specified work and any protective works to be constructed by virtue of paragraph 34(4) must, when commenced, be constructed—

(a) without unnecessary delay in accordance with the plans approved or deemed to have been approved or settled under paragraph 34;

(b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;

(c) in such manner as to cause as little damage as is possible to railway property; and

(d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Network Rail or the traffic on it and the use by passengers of railway property.

(2) If any damage to railway property or any such interference or obstruction is caused by the carrying out of, or in consequence of the construction of a specified work or a protective work, the undertaker must, regardless any such approval, make good such damage and must pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may sustain by reason of any such damage, interference or obstruction.

(3) Nothing in this Part of this Schedule imposes any liability on the undertaker with respect to any damage, costs, expenses or loss attributable to the negligence of Network Rail or its servants, contractors or agents or any liability on Network Rail with respect of any damage, costs, expenses or loss attributable to the negligence of the undertaker or its servants, contractors or agents.

36. The undertaker must—

(a) at all times afford reasonable facilities to the engineer for access to a specified work or a protective work during its construction; and

(b) supply the engineer with all such information as the engineer may reasonably require with regard to a specified work or a protective work or the method of constructing it.

37. Network Rail must at all times afford reasonable facilities to the undertaker and its agents for access to any works carried out by Network Rail under this Part of this Schedule during their construction and must supply the undertaker with such information as it may reasonably require with regard to such works or the method of constructing them.

38.—(1) If any permanent or temporary alterations or additions to railway property are reasonably necessary in consequence of the construction of a specified work or a protective work, or during a period of 24 months after the completion of that work in order to ensure the safety of railway property or the continued safe operation of the railway of Network Rail, such alterations and additions may be carried out by Network Rail and if Network Rail gives to the undertaker reasonable notice of its intention to carry out such alterations or additions (which must be specified in the notice), the undertaker must pay to Network Rail the reasonable cost of those alterations or additions including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by Network Rail in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If during the construction of a specified work or a protective work by the undertaker, Network Rail gives notice to the undertaker that Network Rail desires itself to construct that part of the specified work

or the protective work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker decides that part of the specified work or protective is to be constructed, Network Rail must assume construction of that part of the specified work or the protective work and the undertaker must, regardless of any such approval of a specified work or the protective work under paragraph 34(2) pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may suffer by reason of the execution by Network Rail of that specified work or protective work.

(3) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 39(a) provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

(4) If the cost of maintaining, working or renewing railway property is reduced in consequence of any such alterations or additions a capitalised sum representing such saving must be set off against any sum payable by the undertaker to Network Rail under this paragraph.

39. The undertaker must repay to Network Rail all reasonable fees, costs, charges and expenses reasonably incurred by Network Rail—

(a) in constructing any part of a specified work on behalf of the undertaker as provided by paragraph 34(3) or in constructing any protective works under the provisions of paragraph 34(4) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;

(b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by the engineer of the construction of a specified work or a protective work;

(c) in respect of the employment or procurement of the services of any inspectors, signallers, watchkeepers and other persons whom it is reasonably necessary to appoint for inspecting, signalling, watching and lighting railway property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work or a protective work;

(d) in respect of any special traffic working resulting from any speed restrictions which may in the opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work or a protective work or from the substitution of diversion of services which may be reasonably necessary for the same reason; and

(e) in respect of any additional temporary lighting of railway property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work or a protective work.

40.—(1) In this paragraph-

“EMI” means, subject to sub-paragraph (2), electromagnetic interference with Network Rail apparatus generated by the operation of the authorised development where such interference is of a level which adversely affects the safe operation of Network Rail’s apparatus; and

“Network Rail’s apparatus” means any lines, circuits, wires, apparatus or equipment (whether or not modified or installed as part of the authorised development) which are owned or used by Network Rail for the purpose of transmitting or receiving electrical energy or of radio, telegraphic, telephonic, electric, electronic or other like means of signalling or other communications.

(2) This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to Network Rail’s apparatus carried out after approval of plans under paragraph 34(1) for the relevant part of the authorised development giving rise to EMI (unless the undertaker has been given notice in writing before the approval of those plans of the intention to make such change).

(3) Subject to sub-paragraph (5), the undertaker must in the design and construction of the authorised development take all measures necessary to prevent EMI and must establish with Network Rail (both parties acting reasonably) appropriate arrangements to verify their effectiveness.

(4) In order to facilitate the undertaker's compliance with sub-paragraph (3)—

(a) the undertaker must consult with Network Rail as early as reasonably practicable to identify all Network Rail's apparatus which may be at risk of EMI, and thereafter must continue to consult with Network Rail (both before and after formal submission of plans under paragraph 34(1)) in order to identify all potential causes of EMI and the measures required to eliminate them;

(b) Network Rail must make available to the undertaker all information in the possession of Network Rail reasonably requested by the undertaker in respect of Network Rail's apparatus identified under to sub-paragraph (a); and

(c) Network Rail must allow the undertaker reasonable facilities for the inspection of Network Rail's apparatus identified under to sub-paragraph (a).

(5) In any case where it is established that EMI can only reasonably be prevented by modifications to Network Rail's apparatus, Network Rail must not withhold its consent unreasonably to modifications of Network Rail's apparatus, but the means of prevention and the method of their execution must be selected in the reasonable discretion of Network Rail, and in relation to such modifications paragraph 38(1) have effect subject to this sub-paragraph.

(6) If at any time prior to the completion of the authorised development and regardless of any measures adopted under sub-paragraph (3), the testing or commissioning of the authorised development causes EMI then the undertaker must immediately upon receipt of notification by Network Rail of such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as reasonably practicable after it has been issued) cease to use (or procure the cessation of use of) the undertaker's apparatus causing such EMI until all measures necessary have been taken to remedy such EMI by way of modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in sub-paragraph (5)) to Network Rail's apparatus.

(7) In the event of EMI having occurred—

(a) the undertaker must afford reasonable facilities to Network Rail for access to the undertaker's apparatus in the investigation of such EMI;

(b) Network Rail must afford reasonable facilities to the undertaker for access to Network Rail's apparatus in the investigation of such EMI; and

(c) Network Rail must make available to the undertaker any additional material information in its possession reasonably requested by the undertaker in respect of Network Rail's apparatus or such EMI.

(8) Where Network Rail approves modifications to Network Rail's apparatus under sub-paragraphs (5) or (6) –

(a) Network Rail must allow the undertaker reasonable facilities for the inspection of the relevant part of Network Rail's apparatus; and

(b) any modifications to Network Rail's apparatus approved under those sub-paragraphs must be carried out and completed by the undertaker in accordance with paragraph 21.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 44(1) applies to the costs and expenses reasonably incurred or losses suffered by Network Rail through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Network Rail's apparatus) or in consequence of any EMI to which sub-paragraph (6) applies.

(10) For the purpose of paragraph 39(a) any modifications to Network Rail's apparatus under this paragraph are deemed to be protective works referred to in that paragraph.

(11) In relation to any dispute arising under this paragraph the reference in article 60 (Arbitration) to the Institution of Civil Engineers is to be read as a reference to the Institution of Engineering and Technology.

41. If at any time after the completion of a specified work or a protective work, not being a work vested in Network Rail, Network Rail gives notice to the undertaker informing it that the state of maintenance of any part of the specified work or the protective work appears to be such as adversely affects the operation of railway property, the undertaker must, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work or that protective work in such state of maintenance as not adversely to affect railway property.

42. The undertaker must not provide any illumination or illuminated sign or signal on or in connection with a specified work or a protective work in the vicinity of any railway belonging to Network Rail unless it has first consulted Network Rail and it must comply with Network Rail's reasonable requirements for preventing confusion between such illumination or illuminated sign or signal and any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway.

43. Any additional expenses which Network Rail may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the making of this Order by reason of the existence of a specified work or a protective work must, provided that 56 days' previous notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker, be repaid by the undertaker to Network Rail.

44.—(1) The undertaker must pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule which may ~~he~~ be occasioned to or reasonably incurred by Network Rail—

(a) by reason of the construction or maintenance of a specified work or a protective work or the failure thereof or;

(b) by reason of any act or omission of the undertaker or of any person in its employ or of its contractors or others whilst engaged upon a specified work or a protective work,

and the undertaker must indemnify and keep indemnified Network Rail from and against all claims and demands arising out of or in connection with a specified work or a protective work or any such failure, act or omission: and the fact that any act or thing may have been done by Network Rail on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under his supervision must not (if it was done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this sub-paragraph.

(2) Network Rail must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise of such a claim or demand must be made without the prior consent of the undertaker.

(3) The sums payable by the undertaker under sub-paragraph (1) must include sums equivalent to the relevant costs.

(4) Subject to the terms of any agreement between Network Rail and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, Network Rail must promptly pay to each train operator the amount of any sums which Network Rail receives under sub-paragraph (3) which relates to the relevant costs of that train operator.

(5) The obligation under sub-paragraph (3) to pay Network Rail the relevant costs is, in the event of default, enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator ~~pursuant to~~ under sub-paragraph (4).

~~(6) In no circumstances is the undertaker liable to Network Rail under sub-paragraph (1) for any indirect or consequential loss of profits, except that the sums payable by the undertaker under that sub-paragraph include a sum equivalent to the relevant costs in circumstances where—~~

~~(a) Network Rail is liable to make payment of the relevant costs pursuant to the terms of an agreement between Network Rail and a train operator; and~~

~~(b) the existence of that agreement and the extent of Network Rail's liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in writing to the undertaker, but not otherwise.~~

(6) ~~(7)~~ In this paragraph—

"the relevant costs" means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any restriction of the use of Network Rail's railway network as a result of the construction, maintenance or failure of a specified work or protective work or any such act or omission as mentioned in sub-paragraph (1); and

"train operator" means any person who is authorised to act as the operator of a train by a licence under section 8 of the Railways Act 1993.

45. Network Rail must, on receipt of a request from the undertaker, from time to time provide the undertaker free of charge with written estimates of the costs, charges, expenses and other liabilities for which the undertaker is or will become liable under this Part of this Schedule (including the amount of the relevant costs mentioned in paragraph 44) and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made under this Part of this ~~this~~ Schedule (including any claim relating to those relevant costs).

46. In the assessment of any sums payable to Network Rail under this Part of this Schedule there must not be taken into account any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by Network Rail if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by the undertaker under this Part of this Schedule or increasing the sums so payable.

47. The undertaker and Network Rail may, subject in the case of Network Rail to compliance with the terms of its network licence, enter into, and carry into effect, agreements for the transfer to the undertaker of—

(a) any railway property shown on the works plans and the land plans and described in the book of reference;

(b) any lands, works or other property held in connection with any such railway property; and

(c) any rights and obligations (whether or not statutory) of Network Rail relating to any railway property or any lands, works or other property referred to in this paragraph.

48. Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part I of the Railways Act 1993.

49. The undertaker must give written notice to Network Rail if any application is proposed to be made by the undertaker for the Secretary of State's consent, under article 48 (transfer of benefit of order etc.) of this Order and any such notice must be given no later than 28 days before any such application is made and must describe or give (as appropriate)—

(a) the nature of the application to be made;

(b) the extent of the geographical area to which the application relates; and

(c) the name and address of the person acting for the Secretary of State to whom the application is to be made.

50. The undertaker must no later than 28 days from the date that the documents submitted to and certified by the Secretary of State in accordance with article 57 (certification of documents) are certified by the Secretary of State, provide a set of those documents to Network Rail in the form of a computer disc with read only memory.

ANNEX 2

Sharkey v Secretary of State for the Environment (1992) 63 P. & C.R. 332

SHARKEY AND ANOTHER v. SECRETARY OF STATE FOR THE ENVIRONMENT AND SOUTH BUCKINGHAMSHIRE DISTRICT COUNCIL

COURT OF APPEAL (Parker, McCowan and Scott L.JJ.): October 14, 1991

Compulsory purchase order—Land required for a planning purpose—Meaning of "required"—Whether local authority should exhaust other planning enforcement powers before using compulsory purchase powers—Town and Country Planning Act, 1971, s.112(1)(b)

Gipsies brought mobile homes onto eight plots in the metropolitan green belt, where there was a presumption against development, without obtaining planning permission. They intended to settle permanently there. The local authority proceeded against the gipsies, initially by way of enforcement notices and then by obtaining injunctions, but finally, finding that these procedures were cumbersome, expensive and ineffective, made a compulsory purchase order seeking to purchase all eight plots on the ground that the land was "required" to achieve proper planning of the area within the Town and Country Planning Act 1971, s.112(1)(*b*).

After holding a public inquiry into the compulsory purchase order, the inspector, while accepting that the development was inappropriate and unacceptable in the green belt, recommended that the order should not be confirmed, on the grounds that the council had not satisfactorily shown that this was the only reasonable means of achieving proper planning of the area and that the order was premature. This was not accepted by the Secretary of State, who confirmed the order in respect of four plots on the ground that, on the evidence, successful restoration of the land without the compulsory purchase order would be unlikely in these cases, but deferred his decision in respect of the other four plots where time for compliance with the enforcement notices had not yet expired.

Certain gipsies appealed against the decision of Roch J.,[1] who had dismissed their application to quash the compulsory purchase order. They contended that the land was not "required" by the local authority within section 112(1)(*b*), since there were various ways in which the clearance of the land could be achieved without compulsory purchase.

Held, dismissing the appeal, that in order to show that land was "required" for a purpose which it was necessary to achieve in the interests of proper planning within the Town and Country Planning Act 1971, s.112(1)(*b*), a local authority did not have to show that compulsory purchase of the land was indispensable to the achieving of that purpose, but that it was necessary in the circumstances of the case. It was not enough, however, that such compulsory purchase might be desirable. The Secretary of State was entitled to find that the council was unlikely to achieve successful restoration of the land without compulsory purchase in respect of four plots and to defer a decision in respect of the four further plots where there was a possibility that this might be achieved.

Cases cited:

(1) *Company Developments (Property) Ltd.* v. *Secretary of State for the Environment and Salisbury District Council* [1978] J.P.L. 107.

(2) *R.* v. *Secretary of State for the Environment, ex p. Leicester City Council* (1988) 55 P. & C.R. 364.

[1] *See* (1991) 62 P. & C.R. 126.

(3) *Runnymede Borough Council* v. *Ball* [1986] 1 W.L.R. 353; [1986] 1 All E.R. 629; 53 P. & C.R. 117, C.A.

Legislation construed:
Town and Country Planning Act 1971 (c. 78), s.112(1)(*b*) (see now Planning Act 1990, s.226(1)). The provision is set out at page 335, *post*.

Appeal by L. Sharkey and C. Fitzgerald from a decision of Roch J. on May 11, 1990 (*see* 62 P. & C.R. 126) in which he dismissed their application to quash a compulsory purchase order made by the South Buckinghamshire District Council on October 8, 1985, relating to certain plots of land at Swallow Street, Iver, Buckinghamshire, in the metropolitan green belt, upon which they had installed mobile homes without planning permission. The appellants contended that the district council only required clearance of the land, which could be achieved by prosecution, by the council entering upon the land and clearing it, by injunction or by providing a suitable alternative site. Compulsory purchase was not "required."

Harry Sales for the appellants (applicants).
W. Robert Griffiths for the first respondent.
R. J. Rundell for the second respondent.

PARKER L.J. I will ask McCowan L.J. to give the first judgment.

McCOWAN L.J. This is an appeal from a decision of Roch J. given on the May 11, 1990, dismissing an application by the appellants that the South Bucks District Council (Ivor No. 1) Compulsory Purchase Order 1985 be quashed. The first respondent is the Secretary of State for the Environment and the second respondent is the South Bucks District Council.

The order in question, as made by the South Bucks District Council on October 8, 1985, related to plots 1 to 6, 7A and 7B Swallow Street, Iver. The order as confirmed by the Secretary of State related only to plots 1, 5, 6 and 7A. Postponement of consideration of the order in so far as it related to plots 2, 3, 4 and 7B was directed by the Secretary of State.

Between September 15 and 17, 1987, an inspector held a public inquiry into the compulsory purchase order and also into various enforcement notices with which neither the hearing before Roch J. nor the appeal have been concerned. The reason for that, as we understand it, is that before the case started in front of Roch J. it was agreed between the parties that the appellants would not pursue their appeals against the enforcement on the basis that the council for their part would not take action in respect of them before some date in 1991. Those enforcement notices are therefore effective.

That inspector described the site covered by the order thus:

> The order land is on the west side of Swallow Street and in a generally open area between the north-western and south-western extremities of the built-up areas of Iver and Iver Heath respectively. It is approximately 0.28 (0.69 acres) in area and divided into 7 plots, numbered 1 to 7 consecutively from south to north (Plan A). At the time of the inquiry Plot 7 had been sub-divided into 2, the southern part referred to as Plot 7A and the northern as Plot 7B (Plan Q).

The inspector went on to make findings of fact about, among other things, the state of occupation of the various plots. He said:

> 5. Plot 1, Cherry Orchard, contains a mobile home and hardstanding and garden areas, and is residentially occupied by Mr. Sharkey and family.
> 6. Plot 2, Springfield Rose, contains a mobile home and hardstanding area, and is residentially occupied by Mr. And Mrs. Carey.
> 7. Plot 3, Little Apple, contains a mobile home, touring caravan and hardstanding area, and is residentially occupied by Mr. M. Smith and family.
> 8. Plot 4, Mill Place, contains a mobile home, touring caravan and hardstanding area, and is residentially occupied by Mr. J. Smith and family.
> 9. Plot 5, Silver Birch, contains a mobile home and hardstanding area, and is residentially occupied by Mr. Fitzgerald and family.
> 10. Plot 6, Swallows Nest, contains a mobile home and patio, garden and hardstanding areas, and is residentially occupied by Mr. Stubbings and family.
> 11. Plot 7A, Summerset Place, contains a touring caravan and hardstanding area, and is residentially occupied by Mr. Brown and family.
> 12. Plot 7B, Meadowside, contains a touring caravan and hardstanding and garden areas, and is residentially occupied by Mr. Price and family.

Plots 1 and 5, it is to be noticed, are occupied by the two appellants. The learned judge summarised the situation in this way[2]:

> Those plots were occupied by travellers or gypsies. Often the occupant was the person who had purchased the plot. Entrances were made on to Swallow Street in most cases, although in some cases it was said that existing entrances were used. Hardstanding was put down for caravans and for vehicles, walls were built and gardens cultivated. In addition some septic tanks were constructed.
>
> It seems that the travellers who bought and occupied those plots were travellers who wished to settle, to send their children to school, and to avoid having to move their children from one school to another. In short that the occupants were responsible and orderly people.
>
> However, Swallow Street is within the Metropolitan Green Belt and there was and is a presumption against such development which is only to be displaced in certain exceptional cases. The second respondent, as the local planning authority, were against this unpermitted development and took steps to terminate this unauthorized use of this land.
>
> Enforcement notices were prepared and served under section 87 of the Town and Country Planning Act 1971. In respect of some of the plots there was more than one enforcement notice.
>
> The history in relation to plot 1 was this: that in 1984 four enforcement notices were served. In August 1985 the second respondent used its powers under section 91 of the Town and Country Planning Act 1971 to enter plot 1 and execute the work set out in the four enforce-

[2] (1991) 62 P. & C.R. 126 at p. 128.

ment notices. Consequently, by October 8, 1985 plot 1 was unoccupied and the hardstanding, fences and vehicular access which had existed on plot 1 had been removed.

In May 1986 a High Court injunction was obtained to prevent plot 1 being used by a traveller. In August of 1986 a second such injunction was obtained by the second respondent. In February 1987 further action under section 91 of the Act was taken. In April 1987 a writ was served on the then occupant of plot 1. Nevertheless by September 1987, at the time that a public inquiry was held by a planning inspector, Mr. Brock, plot 1 was being used by a traveller who had a caravan on the plot sited on hardstanding.

The inspector's report indicates that four enforcement notices were served in respect of plot 2, the first on May 15, 1985 and the remaining three on September 3, 1985. Three enforcement notices were served in respect of plot 6, two on September 5, 1985 and the third on September 20, 1985. Five enforcement notices were served in respect of plot 4, four on September 5, 1985 and the fifth on March 7, 1986. One enforcement notice was served in respect of plot 7 on August 8, 1987.

On October 8, 1985 the second respondent promulgated a compulsory purchase order under section 112(1)(b) of the Town and Country Planning Act 1971 seeking authorization to purchase compulsorily the land described in the schedule which was all eight plots, that is to say, plots 1 to 6 7A and 7B which were described in the schedule simply as plot 7; "For the purpose which it is necessary to achieve in the interests of the proper planning in the area in which the land is."

It is convenient at this point to read section 112 of the Town and Country Planning Act 1971. In so far as it is material it provides as follows:

(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily
   (a) any land which is in their area and which is suitable for and is required in order to secure the carrying out of one or more of the following activities, namely, development, redevelopment and improvement;
   (b) any land which is in their area and which is required for a purpose which it is necessary to achieve in the interest of the proper planning of and area in which the land is situated.

As the judge said, the council relied in this case on subsection 1(*b*). The council's case under that subsection before the inspector was summarised by him as follows:

> 167. The need for a compulsory purchase order is due to deliberate flouting of planning control by the occupiers of the land or their predecessors. Normal legal procedures have been shown to be cumbersome, expensive and ineffective. Enforcement procedure has been satisfactory up to a point, but thereafter has been ineffective; prosecutions depend on identification, which is difficult when occupiers come and go, the level of fines imposed is low and injunctions obtained apply only to the persons named. On the Cherry Orchard site [I interpolate that is a reference to plot 1] section 91 action has been found ineffective; twice the land has been cleared, and twice reinstated. A stop

notice on Plot 7 has been ineffective. No grounds exist for expecting that the land would revert to an appropriate Green Belt use even if section 91 powers were again to be used. All except one of the present occupiers have said that they would not reinstate their land to the condition in which it formerly was. Public money would be wasted by the use of section 91 powers, and the aim of protecting the Green Belt would be rendered futile.

168. The only effective means of protection is by compulsory purchase. As a housing action area is purchased for the benefit of the community as a whole, so would the purchase of this Green Belt land be of benefit to the community. In the light of that consideration the order should be confirmed. Even if it is thought that it should not be confirmed in respect of Plots 2 to 6 on the grounds that all other avenues have not yet been fully explored, it should be confirmed in respect of Plots 1, 7A and 7B.

The inspector's conclusion on this issue was:

189. . . . I find the development which has taken place on the land to be inappropriate and unacceptable. In my opinion the location is such that the land should not be left in a derelict or neglected state, but should be put to a suitable rural use. That aim seems to me to be one which it is necessary to achieve in the interests of the proper planning of the area.

190. However, I do not consider that, with the possible exception of Plot 1, the Council have satisfactorily shown that the only practicable means of achieving the aim is by compulsory purchase. With regard to Plots 3 to 6, there is no evidence of prosecutions or attempted prosecutions for non-compliance with those enforcement notices which are not the subject of appeal and should by now have been complied with. Regarding Plots 7A and 7B, action in respect of a breach of the stop notice is apparently still being pursued, and I note that the period for compliance with the enforcement notice issued on September 11, 1987 is not due to and until November 16, 1987. I find insufficient evidence to substantiate a claim that the general level of fines imposed for non-compliance with enforcement notices is so low as to vitiate the value of prosecution.

191. As to the notices currently under appeal, it might be that the appellants would now decide to accept what I believe to be the inevitability of the situation, and would choose to comply with the requirements within the time allowed. The evidence is that, in the event of non-compliance with the notices if upheld, and of the order not being confirmed, the Council would seek to use its powers under section 91 of the 1971 Act. This course of action would no doubt be open to the Council to pursue if it wished, and it does not seem to me necessarily to follow that, because Plot 1 has been reoccupied after such action in the past, further action would fail to have the desired effect in the future.

192. Even if past experience provided a good reason for the compulsory purchase of Plot 1, the purpose which it is necessary to achieve would be unlikely to be realised by the acquisition of an individual plot in isolation. The Council's restoration and landscaping scheme could not be implemented by the use only of Plot 1. With regard to that

> scheme, it seems to me that an appropriate rural use would equally lie in the return of the land to grazing land, whether as a parcel on its own or in conjunction with adjoining land. It could be that the present owners of the land, notwithstanding the evidence given at the inquiry, would be finally convinced that they should dispose of their land, and would offer it for sale to an owner of adjoining or adjacent land for use by him for an appropriate purpose.

I interrupt the reading at this point to make the comment that nothing has happened since to justify the inspector's optimism. He continued:

> 193. I conclude that, whereas it may eventually be found that, in order to achieve the necessary purpose on planning grounds, no practicable alternative exists to compulsory purchase of the land, the making of the order at this stage is, at the least, premature.

He went on to recommend that the compulsory purchase order be not confirmed.

In turn the Secretary of State had this to say on the issue in his decision letter of the February 24, 1989:

> The Secretary of State agrees that the interests of the proper planning of an area within the Metropolitan Green Belt are served by the removal of development which is detrimental to the visual amenities of that area.
>
> 5. In considering the Inspector's conclusions in the light of the council's statement of reasons, the Secretary of State agrees that the development which has taken place on the order land is inappropriate and unacceptable in this generally open area which is within the Metropolitan Green Belt and the Colne Valley Park. He shares the Inspector's opinion that the implementation of the council's proposed landscaping scheme (which was prepared only after the order had been submitted for confirmation) whilst consistent with Green Belt policy, is not the only purpose to which the land could appropriately be put. He agrees that the land should not be left in a derelict or neglected state.
>
> 6. On the basis of the evidence presented at the inquiry, the Secretary of State does not accept in its entirety the Inspector's conclusion that the council have not satisfactorily shown that the only practicable means of achieving the aim of putting the order land to a suitable rural use is by compulsory acquisition. The Secretary of State has had particular regard to the evidence presented by the council as to the result of enforcement action in respect of various sites in the district, including sites which are also the subject of this order. He has concluded, on the balance of probabilities, that successful restoration of the land as a consequence of the upholding of the enforcement notices is unlikely as respects plots 1, 5, 6 and 7A since the evidence of the owners of those plots is to the effect that they would not, or in one case could not afford to restore the land, even if the notices were upheld. Accordingly he has decided to confirm the order in relation to those plots.
>
> 7. The evidence given by the owners of plots 3 and 4 suggests that the land would be restored if the enforcement notices were upheld. In relation to plots 2 and 7B the owners either expressed no view or were undecided about restoration. The Secretary of State considers that it

> would be appropriate in relation to these plots to defer his decision on the order until the period for compliance with the relevant enforcement notices has elapsed. He will then form a view as to the necessity for confirmation of the order in respect of those plots.

I need not read paragraph 8, which deals with certain modifications. In paragraph 9 he went on to say:

> 9. Accordingly, in exercise of the power conferred on him by section 132(2) of the Town and Country Planning Act 1971, he hereby confirms the South Bucks District Council (Iver No. 1) Compulsory Purchase Order 1985 insofar as it relates to plots 1, 5, 6 and 7A subject to the modifications shown thereon in red ink. He hereby directs that consideration of the order insofar as it relates to plots 2, 3, 4 and 7B be postponed until September 28, 1989.

In challenging this decision in the courts the appellants put forward two grounds in their notice. First, it is said that:

> the first respondent treated the likelihood of the applicants carrying out works of restoration in accordance with enforcement notices as the determining factor and in so doing ignored the powers of the Second Respondent to carry out works of restoration under section 91 of the Town and Country Planning Act 1971.

Secondly, that:

> the first respondent considered it unnecessary to confirm the compulsory purchase order in respect of plots owned by other than the applicants and thereby and by his express conclusions concluded that the avowed purpose of the order in the form of the second respondent's proposed landscaping scheme did not justify confirmation of the compulsory purchase order.

The provisions of section 91(1) of the Town and Country Planning Act 1971 there referred to read as follows:

> If, within the period specified in an enforcement notice for compliance therewith, or within such extended period as the local planning authority may allow, any steps which by virtue of section 87(7)(a) of the Act are required by the notice to be taken (other than the discontinuance of a use of land) have not been taken, the local planning authority may enter the land and take those steps, and may recover from the person who is then the owner of the land any expenses reasonably incurred by them in doing so.

It is to be observed, however, that, in practical terms, to do this it would be necessary first to get occupiers off the site.

The appellants submitted before Roch J. that compulsory purchase of the land was not required for the purpose in question, because that purpose could be achieved by other means, notably under section 91. Roch J. was referred to two authorities on the word "required" in this context, as have we. Both cases involve consideration of section 112(1)(*a*) but, as the judge said, and it has not been disputed, the word "required" must have the same meaning in (*b*) as in (*a*).

In *Company Developments (Property) Ltd.* v. *Secretary of State for the Environment and Salisbury District Council* Sir Douglas Frank held that

the word "required" in this context does not mean "essential," but only that the acquiring authority and the Secretary of State consider it desirable to acquire the land to secure the carrying out of the activity in question.

In *R.* v. *Secretary of State for the Environment, ex p. Leicester City Council* McCullough J. considered that the word "required" meant more than mere desirability. Roch J., in this case, dealt with that argument as follows.[3]

> Because of the nature of the power given to local authorities by section 112, namely, to deprive the owner of his land against that owner's will, I prefer and adopt the stricter meaning of the word "required" suggested by the judgment of McCullough J. In my judgment the word means that the compulsory acquisition of the land is called for; it is a thing needed for the accomplishment of one of the activities or purposes set out in the section. However, I accept the dictum of Sir Douglas Frank QC to this extent that neither the local authority nor the Secretary of State have to go so far as to show the compulsory acquisition of the land is indispensable to the carrying out of the activity or the achieving of the necessary planning purpose. The local authority need not have tried to use all their other powers before resorting to compulsory purchase, provided there is evidence on which they and the Secretary of State can conclude that, without the use of compulsory purchase powers, the necessary planning purpose is unlikely to be achieved.
>
> In this case the Secretary of State in paragraph 5 of the letter of his decision correctly, in my view, identified the purpose which it was necessary to achieve in the interest of proper planning of the area in which the land was situated, namely, to remove the development which had taken place and which was inappropriate and unacceptable and to ensure that the land should not be left in a derelict or neglected state. The Secretary of State then went on to consider whether acquisition of the land by compulsory powers was required in the sense of being needed for the accomplishment of the purpose because he has concluded, on the balance of probabilities, that successful restoration of the land was unlikely in respect of plots 1, 5, 6 and 7A, unless the order was confirmed in relation to those plots. In my judgment there was evidence on which the Secretary of State was entitled to reach that conclusion. If the Secretary of State had asked himself the question, is the compulsory acquisition of this land desirable for the accomplishment of the purpose, I would have held that he had applied the wrong test.
>
> Had the Secretary of State gone on to refuse to confirm the compulsory purchase order with regard to the other four plots, then in my opinion there may have been some prospect of his decision being overturned on the grounds of irrationality. However, that is not the decision reached by the Secretary of State and I assume, in his favour, that he will confirm the compulsory purchase order in respect of those plots if, despite the removal of caravans and so forth from those plots, those plots are not restored to some use suitable for the area but are

[3] (1991) 62 P. & C.R. 126 at pp. 133–134.

left in a state where they become or are likely to become derelict and neglected.

I may confess in this case that had the decision been mine, I would have reached the same conclusion as that reached by the inspector, namely, that the making of the compulsory purchase order at that stage was premature. However, it is a well established principle of administrative law that such judgments are for the local authority and the Secretary of State and not for this court.

Consequently the conclusion that I have reached is that I must dismiss these applications for judicial review.

I agree with Roch J. that the local authority do not have to go so far as to show that the compulsory purchase is indispensable to the carrying out of the activity or the achieving of the purpose; or, to use another similar expression, that it is essential. On the other hand, I do not find the word "desirable" satisfactory, because it could be mistaken for "convenient," which clearly, in my judgment, is not sufficient. I believe the word "required" here means "necessary in the circumstances of the case."

Before this court the appellants put their case in this way. It is said by Mr. Sales that the seven grounds of appeal in the notice of appeal all relate to different aspects of the same point, which is that the land, the subject of a compulsory purchase, is not required by the second respondent. Compulsory purchase by, for example, local authorities can be authorised when they require land for the carrying out of their function, such as by-ways, housing, parks, etc. In all cases it is the land itself which is required for the purpose for which there is statutory authority to acquire compulsorily. In the case of section 112(1)(*b*) of the 1971 Act, this, he points out, is an express requirement. But, he says, in this case there is no requirement whatever of the second respondents for the land itself. Their requirement is only the clearance of the land and that could be achieved without compulsory purchase of the land itself by any of the following methods or a combination of them: (1) prosecutions under section 179 of the 1990 Act for non-compliance with enforcement notices; (2) execution of work by the local planning authority plus entry on to the land for that purpose, pursuant to section 178 of the 1990 Act, coupled with a right to recover from the owner expenses reasonably incurred in so doing; (3) injunction proceedings pursuant to section 222 of the Local Government Act 1972; (4) the provision of an acceptable alternative site for the appellants.

I am bound to say, however, that the planning history of the site, notably that of plot 1, gives one little faith in the efficacy of these remedies in dealing with these occupiers. It is indeed important, in my judgment, not to lose sight of two sections of the evidence which was before the Secretary of State. The first of these was the history of the unsuccessful attempt by the council using other methods to get these plots cleared, which history was recounted by Roch J. in a passage which I have quoted from his judgment.

The second section concerned the intentions of the occupants themselves. These the inspector summarised on the evidence they gave as follows. He recounted that Mr. Sharkey, one of the appellants, who occupies plot 1, said in evidence that "they could not afford to restore it to green field land." Mr. Carey's evidence in respect of plot 2 was that he would not be prepared to move to any council owned site. Mr. M. Smith said in respect of plot 3 that he would be prepared, with the council's help, to

reinstate it. Mr. J. Smith from plot 4 said that he would reinstate it to green meadow. Mr. Fitzgerald, the other of the appellants, said of plot 5 that he could not reimburse the council for any costs of reinstatement. Mr. Stubbings from plot 6 said that he would not restore it to its former condition. Mrs. Brown from plot 7A said that they would not themselves clear it. Mr. Price from plot 7B on the other hand, said that he did not know if he would reinstate it.

In the light of all that evidence the Secretary of State was, in my judgment, entitled to arrive at the conclusion that the council were not likely to achieve successful restoration of the land including plots 1, 5, 6 and 7A without compulsory purchase but that in respect of the remaining plots it was still possible that they might.

I agree with Roch J. that, had the Secretary of State refused to confirm a compulsory purchase order with regard to those remaining four plots, some force might have been given to an argument that he had acted irrationally, but, as it is, the plain implication of his decision is that if these plots are not restored to a use suitable for their area he will confirm the compulsory purchase order in respect of them.

As I indicated, a subsidiary argument was advanced by the appellants that by deferring a decision in respect of those plots the Secretary of State has put it out of the council's power to carry out their landscaping scheme. I am satisfied however that this scheme was only put forward at the inquiry as a possible scheme should the order be confirmed in respect of all eight plots. The scheme is not essential to the planning purpose, which is to restore the land to rural use. That purpose can be achieved in respect of a single plot by removal of a caravan, hardstanding, etc., and reversion to grass or shrubs and trees.

For all these reasons I agree with Roch J.'s decision and would dismiss the appeal.

SCOTT L.J. I agree with the judgment that McCowan L.J. has given and would add only one point.

Both before us and before Roch J. Mr. Sales submitted that the power of compulsory purchase given by section 112 of the 1971 Act was a power which should be used only as "a last resort," as he put it. That may be so as between the various statutory powers available to the local authority under the Town and Country Planning Acts. If, however, the choice is between an exercise of the power of compulsory purchase and the alternative route by means of which a local authority may seek to enforce the planning law, namely High Court proceedings for a civil injunction, then I do not agree.

There are statements in a number of cases at levels all the way up to the House of Lords to the effect that the use of civil proceedings for injunctions in order to enforce the public law should be confined to exceptional cases (see, *e.g. Runnymede Council* v. *Ball* and the cases there cited). A civil injunction involves the substitution of an unlimited power of imprisonment, available in contempt of court proceedings against persons who disobey the injunction, for the limited penalties for disobedience of the law prescribed by Parliament. I do not doubt that in many cases local authorities are entirely justified in taking High Court proceedings for injunctions so as to obtain the additional sanction of committal for contempt in order to enforce obedience to the statutory offences in question. But to say that a compulsory purchase power is only to be used as a matter of last

resort after a civil injunction has been shown to be ineffective is a proposition I find entirely unacceptable. Which of the two, compulsory purchase or High Court proceedings, is to be preferred may depend upon the facts of a particular case. Which ought to be the last resort may be a matter of debate in a number of cases. But in the circumstances with which the council was faced in the instant case, I do not regard an application for a High Court injunction, with the possibility of contempt proceedings following, as something which had to be tried before the compulsory purchase procedure could be invoked. I agree that this appeal should be dismissed.

PARKER L.J. I agree. Both the inspector and the Secretary of State came to the clear conclusion that this land was necessary to be acquired in the interests of proper planning and that, unless that purpose could be achieved by other means, a compulsory purchase order was justified. The inspector had a somewhat rosier view of the situation than the Secretary of State and apparently took the view that the purpose might be achieved without a compulsory purchase order. The Secretary of State considered that it could not be achieved in respect of certain of the plots, but that it might conceivably be achieved in respect of others and therefore deferred his decision with respect to those others.

In my view the Secretary of State not only came to the right conclusion but no other conclusion was really open to him. I would also dismiss this appeal.

Appeal dismissed with costs.
Application for leave to appeal to the House of Lords refused.

Solicitors—Lance Kent & Co. Chesham, Buckinghamshire; the Treasury Solicitor; the Solicitor to the South Buckinghamshire District Council.